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In The

Supreme Court of the United States

October Term, 1974

No. 74-264

BANCO DO BRASIL,

Petitioner,

vs.

VENORE TRANSPORTATION COMPANY and OSWEGO SHIPPING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

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No.

BANCO DO BRASIL,

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vs.

VENORE TRANSPORTATION COMPANY and OSWEGO SHIPPING CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Banco do Brasil prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit dated, filed and entered June 13, 1974 which modified the final decree of the United States District Court for the Southern District of New York and ordered, adjudged and decreed that Banco do Brasil, the voyage charterer, pay the full damages sustained by the vessel.

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court, Southern District of New York, Honorable Edward Weinfeld, D.J., printed in the Appendix herein, *infra*, page 1a is reported at 363 F. Supp. 1366. The opinion of the United States Court of Appeals for the Second Circuit (Lumbard and Mays, Circuit Judges, and Jameson, Senior District Judge of the District of Montana, sitting by designation) printed in the Appendix herein, *infra*, page 19a is not yet reported.

JURISDICTION

The decision of the Court of Appeals sought to be reviewed was rendered June 13, 1974 and judgment was entered on the same date.

The jurisdiction of this Court is invoked under Sections 1254(1) and 2101(c) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether the doctrine of this Court as articulated in *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc., et al.*, —U.S.—, 40 L. Ed. 2d 694, 94 S. Ct. (May 28, 1974), requiring division of damages by joint tort feasors, mandates a division of damages in this case as was originally decreed by the District Court.

2. Whether the case at bar applies the "borrowed servant" doctrine differently than was intended by this Court in *The Standard Oil Co. v. Anderson*, 212 U.S. 215, 29 S. Ct. 252, 356, 53 L. Ed. 480, and in conflict with the interpretation of that doctrine by the Third and Fourth Circuits.

3. Whether the "borrowed servant" doctrine may be extended so as to absolve a time charterer from the tortious acts of its agent committed in performing a non-delegable legal obligation of the time charterer.

STATEMENT OF THE CASE

Plaintiff was the owner *pro hac vice* of the S.S. Santore and had time-chartered the vessel to the defendant, third-party plaintiff Oswego. The time charter party required the time charterer to provide the S.S. Santore with a safe berth. Oswego entered into a voyage charter with third-party defendant, petitioner, Banco do Brasil. The voyage charter-party required the voyage charterer to provide the S.S. Santore with a safe berth.

Oswego sent its port captain (Long) to Salvador, Brasil prior to the vessel's arrival at that port for the purpose of making arrangements to expedite the discharge of cargo and turn the vessel around as quickly as possible (JA178*). On Captain Long's arrival *inter alia* he conferred with Cory Brothers (JA159) who was Oswego's local agent (JA32, 36, 60, 102, 103). One of the duties performed by Cory Brothers was to

* Page numbers prefixed by letters "JA" refer to the Joint Appendix filed in the Court of Appeals.

requisition from the wharfinger the equipment required in connection with the berthing of the vessel, including the pontoons to breast the vessel off the dock (JA277-278). Cory Brothers requisitioned only one pontoon (JA278). Both the District Court and the Circuit Court of Appeals found that the berth was unsafe for the sole reason that only one pontoon was provided. Both the District Court and the Circuit Court of Appeals held that the obligation to provide a safe berth for both the time charterer and the voyage charterer was non-delegable.

The District Court found:

> "Banco, as the voyage chartered, breached its warranty to Oswego, just as Oswego, the time charterer, breached its warranty to the shipowner. The acts and conduct of each contributed toward the occurrence and resulting damage sustained by plaintiff for which Oswego has been held liable to the plaintiff shipowner. Under the circumstances, there should be a divison of damages . . ." (Appendix, *infra*, 17a).

The Circuit Court of Appeals found that Cory Brothers, although "arguably negligent" was acting as the "borrowed servant" of the voyage charterer in such negligence.

REASONS FOR GRANTING THE WRIT

This Court on May 28th of this year held that there should be a division of damages between joint tort feasors in admiralty cases. *Cooper Stevedoring Company, Inc., Petitioner, v. Fritz Kopke, Inc. et al.*,__U.S.__40 L.Ed. 2d 694, 700, 94 S. Ct. This Court, in *Cooper*, reviewed the law regarding division of damages and arrived at the conclusion:

> "And a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris*, supra, 137 US, at 14, 34 L Ed 586."

In the case at bar the District Court of the Southern District by the same equitable reasoning held that a division of damages between the time charterer and voyage charterer was proper.

However, the Court of Appeals reversed that portion of the District Court's decision by requiring Banco do Brasil to be responsible for the negligence of Cory Brothers as well as the negligence of its own agents.

In doing so the Circuit Court of Appeals held that Cory Bros. was, when ordering pontoons, the "borrowed servant" of the voyage charterer. *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804, 1951 A.M.C. 851 (2d Cir.1951), *cert. denied*, 342 U.S. 862, 72 S. Ct. 87 (1951).

The Circuit Court of Appeals thus extended the "borrowed servant" doctrine farther than it has ever been extended before. The legal obligation to provide a safe berth was on both the time charterer and the voyage charterer, and was a non-delegable duty of each. The time charterer, for its own economic advantage, sought to expedite the turn-around of the vessel by assuming control over the docking and discharge of the vessel. To that end it flew in its port captain a distance of five thousand miles and it hired an agent to husband the vessel and perform all acts customarily performed by such an agent.

The United States District Court for the Eastern District of Virginia in a thorough analysis of the doctrine of "borrowed servant" observed:

> "All of the reported authorities relating to the issue of 'borrowed servant' discuss the leading case of *Standard Oil Co. v. Anderson,* 212 U.S. 215, 29 S. Ct. 252, 356, 53 L. Ed. 480." *Ware v. Cia De Navegacion Andes, S.A.,* 180 F. Supp. 939.

This Court in *Standard Oil v. Anderson,* succinctly articulated the "borrowed servant" doctrine at pages 221, 222.

> "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an

agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

In the case at bar there is clearly a dual obligation. Cory Brothers was the agent of Oswego and Oswego, through its Captain Long, had the sole power to control and direct Cory Brothers in the performance of its work. Cory Brothers in its efforts to provide the vessel with the necessary equipment at berth was acting more on behalf of the time charterer than it was on behalf of the voyage charterer.

As was pointed out by the Eastern District of Virginia, in *Ware v. Cia De Navegacion Andes, S.A.*, 180 F. Supp. 939, 943:

> "The ultimate test is one of control — a matter not readily resolved. That this particular crane operator was in the general employ of Lamberts Point Docks who selected him, trained him, paid his wages, and had the right to discharge him for incompetency, misconduct, or other reasons, cannot be questioned."

The doctrine of the "borrowed servant" as taught in *Standard Oil v. Anderson*, was applied in the United States Circuit Court of Appeals, Third Circuit, in *Dickerson v. American Sugar Refining Company*, 211 Fed. Rep. 2d, 200, at page 202, as follows:

> "The law dealing with tort liability caused by the negligence of a 'borrowed employee' is well settled, no matter how troublesome may be its application. We begin with the fundamental proposition that the one sought to be held is liable only if he is the master of him who was

negligent. One who is in the general employ of A may, as to certain work, be transferred to the services of B so that he becomes B's servant while engaged in that work. In order to determine whether a person is the employee of A or B, the test is whether the one or the other had the right to control, not only the work to be done, but also the manner of doing it, and the person is the servant of him who has the right to control the manner of performance of the work, regardless of whether or not he actually exercises that right. Then, of course, there is a middle ground. That is, a person may be the servant of two masters, not joint employers, at the same time as to the same act, provided that service to one does not involve an abandonment of service to the other. Such is the case where the employee is transferred to carry on work which is of mutual interest to both of two employers and to effect their common purpose. The result is that, depending upon the evidence, three different conclusions are possible: The person may be the servant of A only, of B only, or of both. Factors which indicate that a person remains the servant of his original master are that the latter has the right to select the employee to be loaned and to discharge him at any time and send another in his place, that the lent servant has the skill of a technician or specialist which the performance of the work requires, that the hiring is at a daily or an

> hourly rate, and that the employment is for no definite period. Furthermore, there is no inference that because the general employer has permitted a division of control, he has surrendered it. None of this is new law."

Likewise, the Fourth Circuit, in *Peoples Supply, Inc. v. Vogel-Ritt of Penn-Mar-Va, Inc.*, 273 F.2d 933, held, at page 935:

> "The ultimate test is which employer had the right to control and direct the conduct of the employee in the performance of the act in question."

The Court of Appeals in the case at bar overruled the District Court's division of damages by holding that because the voyage charterer had contracted with the time charterer to give the vessel a safe berth all of the agents involved in that act were *ipso facto* borrowed servants of the voyage charterer. The Court ignored, however, that the agent of the time charterer was performing its service as agent of the time charterer in accordance with the direct supervision of the time charterer's port captain and in accordance with the time charterer's contract with the owner of the vessel.

> "There is no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact that there has been a division of command. *Charles v. Barrett*, 233 N.Y. 127, 135 N.E. 199,

> an opinion by Judge Cardozo. The employee remains presumptively in the service of his general employer, and the burden is on such general employer to show that in fact allegiance has been transferred." *Ware v. Cia De Navegacion Andes, S.A.*, 180 F. Supp. 939.

See also *Restatement of Agency*, Sections 219, 236 (1958) and Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304, 344-45 (1957).

The rule imposing liability on the principal for the acts of its agent, *Restatement of Agency*, (1958) Sec. 219, and the rule imposing liability on a tort feasor who undertakes the performance of an act and then performs it negligently, *O'Leary v. Erie R. Co.*, 1900, 169 N.Y. 289, 62 N.E. 346; *United States v. Gavagan*, 5 Cir. 1960, 280 F.2d 319, cert. denied, 364 U.S. 933, were disregarded by extending the legal fiction of a "borrowed servant" to a point which defeated justice.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

VENORE TRANSPORTATION COMPANY,

Plaintiff,

-against-

OSWEGO SHIPPING CORPORATION,

Defendant and Third-Party Plaintiff,

-against-

BANCO DO BRASIL,

Third-Party Defendant.

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EDWARD WEINFELD, D. J.

Plaintiff, Venore Transportation Company, owner *pro hac vice* of the S. S. Santore seeks recovery of damages sustained by her while under time charter to the defendant, Oswego Shipping Corporation, during the discharge of a cargo of grain at Bahia, Salvador, Brazil. The claim is based upon Oswego's alleged

breach of the safe berth clause contained in the charter party.[1] At the time of the occurrence the vessel was under a voyage charter from Oswego to Banco do Brasil. In turn, Oswego, as third-party plaintiff, asserts a claim against Banco do Brasil, as voyage charterer, alleging a breach of the safe berth clause in their charter which provided for a voyage from a United States port, with a full cargo of wheat in bulk to Salvador, Recife and Fortaleza in Brazil, with a safe berth at each port. The bill of lading covering the cargo of wheat was endorsed to Moinha da Bahia, S.A. and Bahia Industrial S.A. (hereinafter referred to as "Receivers").

Pursuant to the aforesaid time and voyage charters the Santore sailed from Galveston, Texas, on or about April 24, 1964 with a cargo of wheat bound for Salvador, Brazil, the first discharging port, there to be delivered to the Receivers. The vessel arrived at the port of Salvador in the early evening of May 8, 1964. She was to dock at a pier known as the "Coal Wharf" where the Receivers maintained equipment for the discharge of grain by pneumatic means, but the Santore was directed to an anchorage outside the breakwater because another vessel then at the Coal Wharf had not completed discharging operations. The Santore remained at the anchorage from May 8th until May 10th waiting for the prior vessel to leave the Coal Wharf.

1. The time charter originally was between Narven Steamship Corporation, disponent owner, and Oswego Shipping Corporation: Venore was later substituted for Narven.

free and at about 1:00 P.M. the Santore proceeded to the Coal Wharf. As the vessel approached the vacated berth, it was noticed that only one pontoon was in place instead of two. After talking by megaphone with the shore, the pilot reported that one pontoon had been damaged by the vessel previously in the berth and that it had been towed away for repair. The Master was given to understand by Long and the pilot that the repaired pontoon would be returned in a matter of hours, additionally, the pilot assured the Master it would be "all right" to moor with one pontoon.

The Master, who had no prior experience with pontoons, decided to dock using the one pontoon, and with the assistance of the pilot and two tugs the ship was safely docked by 3:25 p.m. with the pontoon placed amidship about twenty feet away from the dock. The weather then was clear and mild; however, the log entry at 4:00 p.m. reads, "[M]ooring lines have to be continuously tended trying to keep the bow and the stern at an even distance from the dock. One pontoon fender acts as a pivot which is aggravated by the heavy swell and surging of the vessel."

Captain Long, after observing that the discharge equipment was working well, went ashore inviting the Master to join him at his hotel that evening. Shortly after 6:00 p.m., Captain Edelheit went ashore and visited with Long. When the Master left the vessel, things were proceeding smoothly; there were on duty a mate and a quartermaster on deck; and an engineer, fireman and an oiler in the engine room. The remainder of the crew and officers had permission to go ashore and most of them did so. While Captain Edelheit was ashore the weather changed; he returned to the Santore about 10:30 P.M. There was some wind

n brief squalls and intermittent rain; thereafter there was torrential rain, thunderstorms and squalls , the force of which was not recorded except by log entry. The mate reported that they had a hard time with the pontoon; the ship was "working" and the pontoon was acting as a pivot. The Master directed that in the event anything went wrong he be notified immediately and then went to his cabin where he lay down in his shore clothes. After midnight, the ship was rolling and commenced surging more than usual. At 12:20 a.m., the chief engineer made an entry in the engine log: "At Grain Dock - Ship Slamming Dock, Steam on Engines at 12:20, Ready to Maneuver." At about 1:20 a.m., while the Master was in his cabin, the ship took a sharp roll of about twenty to twenty-five degrees. The mate then reported that the wooden housing of the pontoon had been smashed and shortly thereafter that the two metal caissons had been crushed together and the entire pontoon completely destroyed. At or about this time the discharging of cargo was halted. The Master determined an emergency existed, that there was risk of the vessel being smashed and ordered the engines ready for departure. He went ashore to get a pilot and tug boats to take the vessel out of the harbor. He encountered considerable difficulty in his mission because he could not speak Portuguese and could not find anyone on the dock who spoke English. The Master, after some telephonic difficulty, finally reached the duty officer of Cory Brothers who stated that he would attempt to get a pilot and tugs. He was advised that no tug would be available before 6:00 a.m. but an effort would be made to get a pilot. A pilot boarded the Santore at 3:10 a.m. At 3:45 a.m. the ship commenced heaving the port anchor and at 3:52 a.m. all lines were aboard and the ship was clear of the dock. By this time, the ship had been damaged by two incidents

due to the absence of a pontoon and heavy ground swells (1) the bow was sharply dented when the ship forcefully struck the concrete quay, and (2) several of the hull plates were pushed in when the ship pounded against the pontoon before its complete destruction. When the vessel cleared the dock the wind was from the south-east, coming over the sheds and blowing her off the dock.

The ship had no difficulty in leaving the berth and returned to her former anchorage where she remained until May 13th. While at anchorage during this period, the Master refused to go back to another pier without assurance of proper protection. He finally agreed only after representatives of Oswego, the time charterer, Banco do Brasil, the voyage charterer and the Receivers of the cargo, assured him that two or three pontoons and other safeguards would be provided. He then docked at a different pier where three pontoons were supplied, one of which was placed forward, the other amidship and the third aft, and thereupon the discharging of the balance of the wheat cargo was commenced and completed without incident on May 27th.

Against this background of facts, the issue is whether Oswego, the time charterer, breached its warranty to supply a safe berth and if it did, whether it is liable for the resulting damage. The record compels the conclusion that the Coal Wharf was not a safe berth for the Santore and that the warranty was breached. That the vessel was initially docked with only one pontoon and without immediate mishap does not necessarily mean that the pier was a safe berth — one that fulfilled Oswego's obligation under the safe berth clause of the time charter. Clause No. 6 thereof provided that cargos be

"discharged on any dock or at any wharf or place that charterers or their agents may direct, provided the vessel can safely lie always afloat at any time of tide . . . " — a warranty that continued from time of arrival until departure.[3] The wharf with a single pontoon was not a place where the vessel could "safely lie always afloat at any time of tide." The evidence abundantly establishes that one pontoon was insufficient to keep the vessel off the quay under variable conditions reasonably to be anticipated. There was no certainty how long good weather would last.[4] Substantial ground swells of considerable force were a foreseeable occurrence to those familiar with the port. That more than one pontoon was required to make the pier a safe berth also appears from the testimony of da Silva, the port pilot, that all ships with a thirty-foot draft discharging wheat generally used pontoons to keep them from the quay. Since Oswego breached its warranty to provide a safe berth it is accountable to plaintiff for the resulting damages.

Plaintiff's recovery, however, may be lessened if the Master's actions after the Santore was docked were intervening acts of negligence wholly or partially causing the damages

3. *Cf. Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962), *cert. denied*, 372 U.S. 967 (1963); *Constantine & Pickering S.S. Co. v. West India S.S. Co.*, 199 F. 964, 967-68 (S.D.N.Y. 1912) (Hough, D.J.).

4. *Cf. Reardon Smith Line, Ltd. v. Australian Wheat Board*, 2 Lloyd's List L.R. 148, 158 (Austl. 1954): "The absence of a buoy was temporary . . . but . . . the berth was one which, because of the natural features, its situation and its construction, exposed a ship lying at it to considerable danger from northerly weather, and . . the buoy was an attempt to remedy this natural defect in the character of the port. There was no certainty when the buoy would be replaced, just as there was no certainty as to how long the good weather would last . . . [W]hile the buoy was absent the berth was definitely unsafe . . . "

sustained by the vessel.[5] The burden on this issue s upon Oswego.[6] It contends that the Master of the Santore was negligent in various respects and that in any event the damages should be divided equally. Banco do Brasil in resisting Oswego's cross claim makes similar charges which in some respects, but not all, parallel those made by Oswego and so these contentions may be considered together. Banco do Brasil relies upon the testimony of an expert witness to support its plea for exoneration from liability. In general, the contentions are that Captain Edelheit did not act as a reasonably prudent master or exercise good seamanship in that (1) he should have recognized the situation as unsafe when on approaching the Coal Wharf he ascertained that one of the two pontoons had been damaged by the prior vessel and taken away for repairs; (2) he should have taken the vessel back to the anchorage until the damaged pontoon had been repaired and replaced or another substituted; (3) he should have issued an ultimatum to the agent and port authorities that if a second pontoon were not supplied within one-half hour to an hour he would leave the berth; (4) he should not have gone ashore prior to the replacement of the missing pontoon nor relieved most of his crew; (5) he should have maintained his engines in constant readiness for departure; (6) he should have arranged for prompt availability of pilot and tug

5. *See Ore Carriers of Liberia, Inc. v. Navigen Co.*, 435 F.2d 549 (2d Cir. 1970); *Nassau Sand & Gravel Co. v. Red Star Towing & Transp. Co.*, 62 F.2d 356 (2d Cir. 1932); *American President Lines, Ltd. v. United States*, 208 F. Supp. 573 (N.D. Cal. 1961).

6. *See Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 174 (2d Cir. 1962), *cert. denied*, 372 U.S. 967 (1963).

service and immediately upon his return to the vessel, in view of the then existing conditions, have contacted them forthwith; (7) he should have, in view of the deteriorating weather conditions taken departure from the Coal Wharf with or without a pilot or tug assistance especially after the ship experienced the roll of twenty to twenty-five degrees; and (8) he should have employed a bilingual gangway watchman who spoke the local language, or, if one were not available, have sounded the alarm signal and called for pilot and tug assistance.

The cataloging of what the Master "should or should not" have done reflects a prime instance of Monday morning quarterbacking. Banco do Brasil's expert witness had never been in the Salvador port. His judgment in some respects is not only self-contradictory but is challenged by the contrary views of Captain Long and the port pilot who were on the scene, participated in events and were familiar with current local conditions. Thus, both Captain Long and the pilot agreed that under the prevailing conditions it was safe for Captain Edelheit to accept the berth with the one pontoon.[7] In this instance, the expert conceded he, too, would have docked under the existing conditions. Moreover, Captain Edelheit was led to believe by Captain Long and by the pilot that a second pontoon would be supplied in a matter of hours; additionally, he was assured by the pilot that it would be "all right" to berth the vessel with the

7. Captain Long in his deposition testified: "I felt at the time that the vessel could safely lie alongside the one pontoon, and certainly, since it was only a matter of hours before the other one was going to become available I felt there was no problem at all." (Long dep. p. 54). The port pilot, da Silva, testified that at the time of docking one pontoon was "sufficient because the sea was very calm, there were no waves, nor ground swells." (da Silva dep. p. 27).

one pontoon pending the delivery of the second.[8] Captain Edelheit, unfamiliar with conditions at the port, was entitled to rely on these assurances.[9] He was unaware that variable conditions at the Salvador port could thereafter make the use of one pontoon hazardous and render the wharf unsafe. Moreover, even had no assurances been given, the charter party was itself an express assurance that the berth was safe, upon which the Master had a right to rely[10] Under all the circumstances, the Santore's Master was justified in docking at the Coal Wharf even though only one pontoon was then supplied.

As to the contentions that Captain Edelheit should not have gone ashore or relieved most of his crew and should have maintained his engines in readiness, Captain Long testified that he did not think it unusual that the Master left the vessel to go ashore when he did since everything was then moving along smoothly. Long and the pilot were of the view that, considering the anticipated delivery of the second pontoon, there was no reason for concern about the ship's safety when Captain Edelheit went ashore. The Master testified that he did not consider an emergency existed until the steel caissons of the pontoon had been destroyed, which occured at approximately 1:20 a.m., a judgment for which under all the circumstances he cannot be

8. The pilot was "performing a service for which the charterer was responsible." *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804, 806 (2d Cir. 1951), *cert. denied*, 342 U.S. 862 (1951).

9. *Cities Service Transp. Co. v. Gulf Refining Co.*, 79 F. 2d 521 (2d Cir. 1935).

10. *See Paragon Oil Co. v. Republic Tanker, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962), *cert. denied*, 372 U.S. 967 (1963); *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir. 1951), *cert. denied*, 342 U.S. 862 (1951).

faulted.[11] He was then confronted with an unanticipated situation and acted with due diligence. He was of the view that although Salvador was not a compulsory pilot port, under the worsening weather and sea conditions with a Brazilian naval vessel directly astern of the Santore and his general unfamiliarity with the port, he would risk not only greater damage to the vessel but even the loss of lives were he to take the vessel out without the aid of a pilot.[12] Again, only a wisdom born of hindsight would attribute fault to the Master in waiting for a pilot familiar with the harbor. Here, it is not without interest that da Silva, the experienced port pilot, testified that when conditions are dangerous a captain always calls for a pilot. Taking into account the extreme weather and sea conditions and the Master's lack of familiarity with the port, the prospect was real that had he undertaken to leave the quay, without the aid of a port pilot or tugs, if available, it could have presented a risk of even greater damage than that sustained by the vessel. That it now appears alternative procedures (i.e., leaving the berth without a pilot) might have been a safe course does not establish that the Master's actions taken as events unfolded were unreasonable.[13] As to the claim that the Master should have

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11. "The Court will seldom question the judgment of a ship master in making his decisions as to the proper handling of his vessel." *The Maurice R. Shaw*, 46 F. Supp. 767, 769 (D.Me. 1942). *Cf. The Smith Terry No. 1*, 34 F.2d 570 (S.D. Fla. 1923), *aff'd. sub nom. Hupper v. Hyde*, 296 F. 862 (5th Cir. 1924).

12. The deck log entry on May 11th at 1:20 a.m. reads in part: "Harbour congested with navigational hazards and local knowledge and assistance imperative . . . . ."

13. *Cf. American President Lines, Ltd. v. United States*, 208 F. Supp. 573 (N.D. Cal. 1961).

There remains Oswego's claim against Banco do Brasil for indemnity and counsel fees based upon the safe berth warranty by Banco, as the voyage charterer. Banco resists Oswego's claim upon several grounds. First, it contends that responsibility for the lack of a second pontoon which resulted in rendering the berth unsafe rests upon Cory Brothers who requisitioned only one pontoon; that since Cory Brothers acted as agents for both Venore, the shipowner plaintiff, and Oswego, the defendant time charterer, the sole responsibility for the unsafe berth is attributable to their intervening negligence which exonerates Banco do Brasil from liability for any breach of its warranty. Next, it contends that both the shipowner and Oswego knew that Banco do Brasil, as voyage charterer, was a bank arranging for grain to be imported into Brazil to help alleviate hunger there and hence neither one "could be said to have relied upon the nautical knowledge of the bank but obviously chose to rely and did rely on the Master, expeditor (Captain Long) and the ship's agent, Cory Brothers." The latter contention is not only irrelevant but without substance. Banco's express warranty of a safe berth is not nullified because it is a bank or allegedly was engaged in a non-commercial transaction. The warranty means what it says, and if Banco committed a breach, it is cast in liability just as any other warrantor who fails to live up to its contractual undertakings.

As to the claim of exoneration from liability, Banco's position, however it phrases its various contentions, is that it had nothing to do with the berthing of the vessel; that all negligent acts and conduct with respect thereto, if any, were those of Cory Brothers, acting for both the owner and Oswego; in sum, that it had no agent in Salvador whose conduct can be

charged to it. Under the voyage charter, the vessel was consigned to "charterers' agents" at port of discharge. Banco in answer to an interrogatory as to the name of its agent at Salvador, stated "Banco do Brasil had no agent other than the one indicated in the Charter Party" and then added "[No agent was listed in the Charter Party in the Port of Salvador . . .]." Banco denies that Cory Brothers was its agent there.

But assuming, as Banco contends, that Cory Brothers was not its agent for any purpose, who was? Banco, the voyage charterer, was required to designate the berths of discharge. As already noted, the bill of lading covering the cargo of wheat was endorsed to Moinha da Bahia, S.A. and Bahia Industrial, S.A.; they were designated by Banco do Brasil as Receivers of the cargo at Salvador. The Receivers nominated the Coal Wharf as the discharging pier. It cannot be gainsaid that in performing that function they were acting for Banco. Captain Long had been in close consultation with the Receivers during the two days before the arrival of the shipment and had worked out with them an addition to their pneumatic discharging equipment to expedite the cargo delivery to them. The Receivers' relation to Banco was such that in its post-trial brief Banco perforce acknowledged " . . . Banco do Brasil does not suggest that because it had no agent in Brazil that it was less responsible for the nomination of a safe berth than it would be if it had an agent. Banco do Brasil freely and willingly accepts the responsibility it contracted to, i.e., the furnishing of a safe berth. The berth was nominated by the Receiver and if the berth was not safe the responsibility is Banco do Brasil's." Having thus acknowledged its obligation under the warranty, Banco seeks exoneration by adding: "However, if a berth which is safe

requires some additional equipment because of the nature or characteristics of the vessel, the need for which is open and obvious to those controlling the destiny of the vessel, then the failure to secure such equipment or even request the same is upon those who accept the onus to do so and if it is done improperly the responsibility is attributable to that agent or its principal." This attribution of fault to the shipowner or Oswego, or both, a reiteration of Banco's main contention, does not however relieve it of its express obligation under the warranty of a safe berth — a non-delegable obligation.[15] The Coal Wharf designated by the Receivers proved to be unsafe. The Receivers, whose equipment was immediately adjacent to the quay, were particularly knowledgeable of conditions at the harbor and the Coal Wharf and knew that without at least two pontoons it was not a safe berth for the Santore. Moreover, during the two days prior to the vessel's arrival and during Captain Long's consultation with the Receivers on expediting the cargo delivery, they knew that the two pontoons were used by the prior vessel. The Receivers and Captain Long had anticipated that two would be available to the Santore when she berthed. Two pontoons were in position when Captain Long went aboard the Santore on May 10th to advise that the berth would be vacated and was available for the discharge of the Santore's cargo. When the Santore was berthed, the pneumatic system was attached to the vessel to unload the cargo; the Receivers then knew there was only one pontoon, thereby rendering the wharf unsafe during the entire period required for

15. In *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir. 1951), *cert. denied*, 342 U.S. 862 (1951), the owner of a vessel hired a pilot who negligently designated an unsafe anchorage. The charterer was held liable since the pilot was performing a service for which the charterer was responsible.

unloading the wheat cargo. Thus, even if Cory Brothers was not Banco's agent, or if Banco had no agent in Salvador, the Receivers designated a berth for the discharge of cargo, which it knew was unsafe with but one pontoon. It was performing a service for which Banco is responsible.[16] That Oswego also failed in its duty to the shipowner does not relieve Banco of its breach in the designation of an unsafe berth. Banco, as the voyage charterer, breached its warranty to Oswego, just as Oswego, the time charterer, breached its warranty to the shipowner. The acts and conduct of each contributed toward the occurrence and resulting damage sustained by plaintiff for which Oswego has been held liable to the plaintiff shipowner. Under the circumstances, there should be a division of damages and Oswego is entitled to recover from Banco one-half of the judgment awarded in favor of the plaintiff.

Both the defendant and third-party defendant urge that this Court, in the exercise of its power as an admiralty Court,[17] disallow prepayment interest on the ground of inexcusable delay by plaintiff in bringing this suit and its dilatory conduct in completion of the Master's deposition, which further delayed the trial. The damage sustained by the Santore occurred on May 10, 1964, almost ten years ago. Plaintiff did not commence this

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16. *Cf. Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804, 806 (2d Cir. 1951), *cert. denied*, 342 U.S. 862 (1951); *see also Seaboard Sand & Gravel Corp. v. Moran Towing Corp.*, 154 F.2d 399 (2d Cir. 1946); *O'Donnell Transp. Co. v. N. & J. Tracy, Inc.*, 150 F.2d 735 (2d Cir. 1945).

17. *O'Donnell Transp. Co. v. City of New York*, 215 F.2d 92, 95 (2d Cir. 1954); *The Scotland*, 118 U.S. 507, 518-19 (1886); *see also Ore Carriers of Liberia, Inc. v. Navigen Co.*, 435 F.2d 549 (2d Cir. 1970).

action until March, 1969, and no explanation has been offered for this inordinate delay. The taking of the Master's deposition dragged on and was not completed until September, 1970. To allow interest from the date of the casualty would amount to more than sixty (60%) percent of the judgment, which in view of plaintiff's inexcusable delay in commencing suit would result in rewarding dilatory conduct. Had plaintiff acted with diligence the case could readily have been prepared and tried within three years after the casualty.[18] Under the circumstances, interest will be allowed for a period commencing three years prior to the entry of judgment herein.

The foregoing, together with the findings stipulated by the parties, shall constitute the Court's findings of fact anc conclusions of law.

Judgment may be entered accordingly.

Dated:

New York, New York
August 29, 1973

United States District Judge

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18. *See* 1967 Dir. Admin. Off. U.S. Cts., Ann. Rep. 128-29.

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 871-894—September Term, 1973.

(Argued April 23, 1974 Decided June 13, 1974.)

Docket Nos. 74-1007
73-2759

VENORE TRANSPORTATION COMPANY,

Plaintiff-Appellee,

—v.—

OSWEGO SHIPPING CORPORATION,

Defendant, Third Party Plaintiff-Appellant-Appellee,

—v.—

BANCO DO BRASIL,

Third-Party Defendant-Appellant-Appellee.

Before:

LUMBARD and MAYS, *Circuit Judges,*
and JAMESON, *District Judge.**

Appeal from a judgment of the District Court for the Southern District of New York, Edward Weinfeld, *Judge,*

* Senior District Judge of the District of Montana, sitting by designation.

awarding damages to owner *pro hac vice* of vessel for breach of warranty of safe berth by time and voyage charterers.

Modified as to the division of damages with the voyage charterer required to indemnify the time charterer in full.

DANIEL HUTTENBRAUCK, Esq., New York, N.Y. (Mendes & Mount, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

WILLIAM WARNER, Esq., New York, N.Y. (Symmers, Fish & Warner, New York, N.Y., on the brief), *for Defendant, Third Party Plaintiff, Appellant Appellee.*

RICHARD L. NEWMAN, Esq., New York, N.Y. (Newman & Schlau, New York, N.Y. and Frank E. Nattier, New York, N.Y., on the brief), *for Third-Party Defendant-Appellant-Appellee.*

LUMBARD, *Circuit Judge:*

Defendant and third party plaintiff, Oswego Shipping Corporation, a time charterer, and third party defendant, Banco do Brasil, a voyage charterer, appeal from a judgment in the Southern District which awarded $265,727.29 to plaintiff, Venore Transportation Company for breach of warranty of safe berth by both Oswego and Banco do Brasil resulting in damage to the SS Santore, of which Venore was owner *pro hac vice.*[1] Concluding that the acts

1 An owner *pro hac vice* is not the true owner of a vessel, but rather one who has entered a demise charter under which the true owner surrenders full control of the ship. The owner *pro hac vice* may then enter into time or voyage charters with other parties and in relation to these parties it stands in the position of the owner. Gilmore & Black, The Law of Admiralty § 4-23 (1957).

and conduct of Oswego and Banco do Brasil were responsible for the damage to the Santore, 363 F.Supp. 1366, 1374 (S.D.N.Y. 1973), Judge Weinfeld held that "there should be a division of damages" with Oswego, the time charterer, directly liable to Venore for the full extent of loss, and Banco do Brasil required to indemnify Oswego for one half of the judgment recovered by Venore.

On appeal, Oswego argues that it is entitled to full indemnification from Banco do Brasil. Banco do Brasil also appeals and seeks to avoid any liability by maintaining that a safe berth was, in fact, provided the Santore; that even assuming the berth was not safe, the intervening negligence of the vessel relieved the charterers from liability; and that, in any event, the intervening negligence of the time charterer, Oswego, relieved it, the voyage charterer, from any obligation to indemnify. The judgment of the district court is modified with regard to the division of damages to the extent that we hold that Banco do Brasil must indemnify Oswego in full. As so modified, the judgment is affirmed.

On April 24, 1964, the SS Santore, a 14,095 gross-ton ship, owned *pro hac vice* by Venore Transportation Company, sailed from Galveston, Texas, loaded with a full cargo of wheat destined for hunger-stricken northeastern Brazil. The ship was under a standard New York Produce Exchange form of time charter, clause 6 of which provided that "the cargo or cargoes be ladened and/or discharged in any dock or at any wharf or place that charterers or their agents may direct, provided the vessel can safely lie always afloat at any time of tide, except at such place where it is customary for similar size vessels to safely lie aground."

Oswego, in turn, had entered into a voyage charter with Banco do Brasil which provided in part that Banco do Brasil would assure safe berths in Salvador, Recife, and

Fortaleza, the Brasilian ports at which the SS Santore was to discharge its cargo.

On the evening of May 8, 1964, the SS Santore arrived in Salvador. She was to dock at a pier known as the "Coal Wharf" where two receivers designated by Banco do Brasil maintained equipment for the discharge of grain. At the time of the Santore's arrival, however, another ship was occupying the berth, so that the Santore remained at an anchorage outside the breakwater awaiting the departure of this other vessel.

Two days prior to the Santore's arrival, Captain Edward Long, Oswego's port captain, had arrived in Salvador to arrange for the ship's docking and the expeditious discharge of cargo. Captain Long, who had never before been in Salvador, discussed docking arrangements with Cory Brothers, Oswego's agents in Salvador, and spoke with the receivers designated by Banco do Brasil, Moinha da Bahia, S.A. and Bahia Industrial S.A., about the installation of special equipment to facilitate the unloading process. He also inspected the wharf and concluded that it was satisfactory in all respects. While there, he noticed that two pontoons were placed between the pier and the discharging vessel then lodged there, the purpose being to prevent the ship from striking against the concrete pier and to enable the vessel to float in water deeper than its draft while docked.

After the SS Santore's arrival, Captain Long went on board and discussed with Captain Edelheit, the ship's master, plans for discharging the cargo. At this time, Captain Long informed him about the use of the pontoons at the berth.

On May 10 at about 1:00 p.m. the Santore proceeded to the Coal Wharf for docking. As the ship neared the dock, it was noticed that one of the pontoons was missing. After inquiries were made by the harbor pilot, he and Captain

Long reported back to Captain Edelheit that the pontoon had been damaged, that it would be returned within a few hours, and in the meantime it would be "all right" for the Santore to moor with one pontoon.

Relying on these assurances, Captain Edelheit, who had no familiarity with the port at Salvador and had had no prior experience with pontoons, proceeded to dock the ship. After he and Captain Long were convinced that the unloading equipment was functioning properly, Captain Long went ashore, followed shortly thereafter by Captain Edelheit at about 6 p.m. While the captains were ashore, the weather changed. First there were brief squalls and intermittent rain; thereafter there was torrential rain, thunderstorms, and squalls. When Captain Edelheit returned to the ship at 10:30 p.m., the SS Santore was rolling and slamming into the pier with the single pontoon acting as a pivot.

At 1:20 a.m., the ship took a sharp roll and crushed the pontoon. Fearful that the vessel would be seriously damaged, Captain Edelheit went ashore to get a pilot and a tug to assist in moving the ship to open water. Because he could not speak Portuguese, he encountered some initial difficulty in obtaining assistance, but eventually contacted Cory Brothers, Oswego's agents in Salvador. A pilot was found and the SS Santore was moved from its berth. Subsequent investigation revealed that the bow of the ship had been sharply dented and that several of its hull plates had been pushed in as a result of the ship's smashing against the dock and the pontoon.

After leaving its berth, the ship remained at its earlier anchorage beyond the breakwater until May 13. During this period Captain Edelheit refused to return to the pier without an assurance that at least two, and preferably three pontoons would be provided. On May 13, the Santore

finally docked at a different berth which had three intact pontoons.

I.

The first question which we address is whether there was intervening negligence on the part of the ship's master, Captain Edelheit, relieving the charterers of liability. See, e.g., *Ore Carriers of Liberia, Inc.* v. *Navigen Co.*, 435 F.2d 549 (2d Cir. 1970); *Nassau Sand & Gravel Co.* v. *Red Star Towing and Transportation Co.*, 62 F.2d 356 (2d Cir. 1932). We agree with Judge Weinfeld's conclusion that there was no such negligence. Prior to docking the SS Santore, Captain Edelheit relied on the assurance of Captain Long and the harbor pilot that a second pontoon would be supplied shortly and that in the interim it would be "all right" to berth the vessel with only one pontoon. Being unfamiliar with conditions in the harbor, the master was entitled to rely on these assurances. Moreover, as Judge Weinfeld emphasized, "even had no assurances been given, the charter party was itself an express assurance that the berth was safe, upon which the Master had a right to rely." 363 F.Supp. at 1371. *Cities Service Transportation Co.* v. *Gulf Refining Co.*, 79 F.2d 521, 524 (2d Cir. 1935).

Nor was Captain Edelheit negligent in going ashore the evening of May 10 or in the actions he took upon returning to the ship. There was no reason for the Master to fear for the ship's safety when he went ashore. The Santore had been properly docked and the equipment for discharging the cargo was functioning properly. When he returned and discovered that the vessel was slamming against the pontoon, he took appropriate steps in a timely fashion to remove her from the berth. The master did not err, as charged by Banco do Brasil, in refusing to leave the berth without a pilot. In light of the torrential storm, Captain Edelheit's unfamiliarity with the harbor, and the presence

of a Brazilian naval vessel anchored directly astern, his was actually the more prudent course to follow. Appellant's additional claims that the captain should have employed a bilingual watchman who could have aided him in locating a pilot immediately, and that the Master should have blown a whistle signal for a pilot are also without merit. The record reveals that bilingual watchmen are rarely hired in foreign ports. As for the Master's failure to blow the signal, there is no evidence that Salvador provided for such a signal in its sailing directions. In any event, it is far from certain that a pilot would have arrived any more quickly had a signal been blown by the captain.

II.

The question remains whether Banco do Brasil must indemnify Oswego for the full amount of the judgment recovered by Venore. In this regard, it is important to note that the relationship between Banco do Brasil and Oswego was not unlike that between Oswego and Venore. Banco do Brasil had also warranted that a safe berth would be provided in Salvador. Its receivers, Moinha da Bahia, S.A. and Bahia Industrial, S.A., had specifically chosen the Coal Wharf as the discharging pier. Indeed, Banco acknowledged in its post-trial brief, that "[t]he berth was nominated by the Receiver and if the berth was not safe the responsibility is Banco do Brasil's."

Nevertheless Banco do Brasil contends that a safe berth was provided and that

> "if a berth which is safe requires some additional optional equipment [pontoons] because of the nature or characteristics of the vessel, the need for which is open and obvious to those controlling the destiny of the vessel, then the failure to secure such equipment or even request the same is upon those who accept the

onus to do so, and, if it is done improperly, the responsibility is attributable either to that agent or its principal."

Judge Weinfeld correctly rejected this argument. Banco do Brasil had an express obligation to provide a completely safe berth, an obligation which was nondelegable. *See Park S.S. Co.* v. *Cities Service Oil Co.*, 188 F.2d 804 (2d Cir.), *cert. denied*, 342 U.S. 862 (1951). The receivers, acting on behalf of Banco do Brasil, were fully aware of the conditions at the Coal Wharf and that, without at least two pontoons, it would be unsafe for the SS Santore to dock there. They were aware that the previous vessel had used two pontoons and in their discussion with Captain Long they anticipated that the same would be employed with regard to the Santore. Nevertheless, they permitted the docking of the ship and the unloading of its cargo to proceed although they were fully aware that two pontoons had not, in fact, been provided. In short, they designated a berth for docking and unloading, which they knew to be unsafe. Since they were acting on behalf of Banco do Brasil, the latter must be considered to have breached its safe berth warranty.

Banco do Brasil argues that, even assuming the berth was unsafe, the intervening negligence of the time charterer was the cause of the damage and that, therefore, Oswego should be solely liable to Venore, with no claim over against Banco do Brasil for indemnity. This argument is without merit. The burden was on Banco do Brasil to establish Oswego's intervening negligence. *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), *cert. denied*, 372 U.S. 967 (1963). While Judge Weinfeld did not express his views on this point, it does not appear from the record that Oswego was in any way negligent. Captain Long was no more familiar with the port at

Salvador or the berth at which the SS Santore was to dock than was Captain Edelheit. Having no specified knowledge of port conditions, Captain Long was entitled to rely on the assurance of the same berth warranty given by the Banco do Brasil just as was Captain Edelheit on Oswego's warranty. Moreover, both captains learned at the same time that two pontoons would not be available. Captain Long made no suggestion that the ship be docked with only one pontoon. Under the circumstances, if Captain Edelheit, who was primarily responsible for the safety of the ship, was not found to be negligent for docking with just one pontoon, then certainly Captain Long was not negligent.

While Judge Weinfeld found that Captain Edelheit "was led to believe by Captain Long and by the pilot that a second pontoon would be supplied in a matter of hours," there is nothing in the record which establishes that Captain Long actually gave a separate assurance. Rather, from the testimony of both captains, it appears that someone on the bridge, probably the pilot, called down to the shore and was informed that a second pontoon would soon be supplied. This information was then relayed to Captain Edelheit, possibly by Captain Long.

The Cory Brothers were also agents for Oswego. But to the extent that they assisted in designating a safe berth for the SS Santore, they were acting on behalf of the receivers and Banco do Brasil, the latter of which had the non-delegable duty of supplying a safe berth. *Park S.S. Co.* v. *Cities Service Oil Co.*, 188 F.2d 804 (2d Cir. 1951). Moreover, while it could be argued that Cory Brothers was negligent in permitting the SS Santore to dock once it became aware that there would be only one pontoon available for several hours, fault for the damage caused can hardly be placed here since the receivers, acting directly on behalf of Banco do Brasil, which had primary responsibility for providing

a safe berth, were also aware at the same time as was Cory Brothers of the absence of one pontoon, yet they did not advise the vessel not to dock. As Oswego points out, nothing on the part of Captain Long or Cory Brothers "hindered, hampered, misled or prevented Banco do Brasil in or from the performance of its obligation to furnish a safe berth." Under the circumstances, the safe berth warranty from Banco do Brasil to Oswego should be given the same full effect as was given the warranty from Oswego to Venore.

The judgment is modified accordingly to allow full recovery by Oswego against Banco do Brasil, and as so modified, it is affirmed.

Supreme Court, U. S.
FILED
OCT 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74/264

BANCO DO BRASIL,

Petitioner,

vs.

VENORE TRANSPORTATION COMPANY and OSWEGO SHIPPING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT OSWEGO SHIPPING CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (App. A of Petition) is reported at 363 F. Supp. 1366. The opinion of the United States Court of Appeals for the Second Circuit (App. B of Petition) is reported at 498 F. 2d 469.

QUESTION PRESENTED

Whether the time charterer of a vessel (respondent), who is liable to the shipowner for damage to the vessel by

reason of breach of warranty of a safe berth may recover full indemnity from the voyage or subcharterer (petitioner) under a similar warranty of safe berth, where the assignee of the voyage charterer (receiver of the cargo) designated and provided the unsafe berth?

STATEMENT

The voyage in question was for the carriage of a full cargo of grain from a U. S. Gulf port to Salvador and other Brazilian ports in the SS SANTORE. The ship was at the general disposal of respondent Oswego Shipping Corporation (hereinafter "Oswego") under the usual New York Produce Exchange form of time charter. It was subchartered to petitioner Banco Do Brasil (hereinafter "Banco") for a voyage. Under the voyage charter a safe berth was to be provided by Banco. Banco assigned the bill of lading to two flour mills as consignees (hereinafter "Receivers"). Banco expressly admits that it is responsible for the actions of the Receivers. The Receivers required delivery at their mill which was immediately adjacent to the quay berth known as the Coal Wharf. The Receivers designated the Coal Wharf as the place of discharge. There was insufficient depth of water immediately alongside the berth for large vessels such as the SANTORE. Large vessels were accommodated by being breasted off by pontoon(s) which were furnished by the harbor authority which owned the wharf. Application for the use of this berth was made through a local firm of ships' agents, Cory Brothers. There is no evidence as to who requested Cory Brothers to file the application. Presumably the Receivers made the request. The voyage charter provided that the ship should be consigned to "Charterer's Agents". The application form filed with the harbor au-

thorities had provision for the ordering of pontoons and other services, but these particulars were left blank. In addition to its general business, Cory Brothers acted as agent for Oswego and also for the Shipowner. It acted for Oswego as agent in the matter of Oswego's obligations under the charter parties. These consisted principally in the husbanding of the ship. Although Oswego was responsible to the Shipowner for the safety of the berth, the actual furnishing of the berth as between Oswego and Banco was the responsibility of Banco, an obligation which it performed through the Receivers. The berth was unsafe for a vessel such as the SANTORE without the use of two pontoons. After lying at anchor awaiting the departure of another vessel the SANTORE was docked with the use of only one pontoon. Damage resulted during that night when the pontoon collapsed in sudden heavy weather and the ship struck the dock.

Oswego sent a cargo expediter, Captain Long, to Salvador. Captain Long arrived several days before the docking and *after* the designation and requisition had been made for the berth. He had and exercised no power of control or direction over either ship or Receivers' operations or over Cory Brothers, except to make suggestions with regard to cargo and husbanding operations. He saw that there were two pontoons in use by the prior vessel occupying the berth and assumed that the same two pontoons would be available to the SANTORE. When the SANTORE approached the berth to dock there was only one pontoon and the pilot upon making inquiry was advised that the other pontoon had been damaged by the prior vessel in leaving the berth and had been removed for repairs and would be returned in a few hours. The ship's master decided that the ship be docked forthwith and this was done with the use of only one pontoon.

Oswego has been held liable to Shipowner for the damage to the vessel and in turn entitled to full indemnity from Banco.

ARGUMENT

There is no issue as to unsafe berth or of Oswego's liability to Shipowner. The sole issue is whether there should be a division of liability between Oswego and its subcharterer upon whom the ultimate responsibility for safety of berth was placed by the contract between them. Oswego has been held liable to the Shipowner and Banco in turn has been held liable to Oswego, not as tortfeasors, but rather for breach of contractual obligations, the successive and independent warranties of safe berth. Breach of Time Charterer's warranty to Shipowner does not preclude full recovery of indemnity under the warranty of the subcharterer to Time Charterer, *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F. 2d 169 (2d Cir., 1962); *cert. denied*, 372 U. S. 967 (1963). The thrust of Banco's submission is that it may lessen the amount of damages for which it is responsible by showing negligence on the part of the person wronged (Oswego) in failing to take steps to lessen probable damages.

POINT I.

THE DECISION BELOW IS CLEARLY CORRECT.

The District Court made no finding of negligence on the part of Oswego. The Court of Appeals specifically found Oswego was not negligent. Petitioner's present sole contention is that Cory Brothers acted negligently in requisitioning the berth and that this was done on behalf of Oswego. There is nothing to indicate that Cory Brothers

assumed the responsibility of providing a safe berth. No negligence can be attributed to failure to specifically order two pontoons at the time the berth application was filed, for two were in use by the prior vessel. All concerned justifiably assumed two would be available for the SANTORE. The lack of one pontoon was due to an unexpected and unforeseen event immediately prior to the docking. There was no causal connection between the application for berth space and the casualty. The Receivers, the ship's master and Captain Long were all present at the actual docking and of course knew what the situation was. There is nothing to show that Cory Brothers knew or should have known at that time of the unexpected damage to one pontoon and its subsequent non-availability. Neither the ship's master nor Captain Long had any communication with any shore representatives after the docking until they both went ashore at the close of the business day. Even if "arguably" there be found some indication of negligence it is clear that there was no conduct such as to hamper, hinder, impede or prevent performance by the warrantor. *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Italia Societa Per Azioni* v. *Arigon Stevedoring Co.*, 376 U. S. 315 (1964); *Waterman Steamship Corp.* v. *David*, 353 F. 2d 660 (5 Cir., 1965). The Court of Appeals found that the Receivers were fully aware of the conditions at the Coal Wharf, that two pontoons would be necessary for safety, that they anticipated two would be provided and nevertheless permitted the docking of the ship and the unloading of its cargo to proceed although fully aware that two pontoons had not, in fact, been provided. There was no causal relationship of any act of Cory Brothers. The ultimate, sole responsibility was that of Banco.

POINT II.

THERE IS NO CONFLICT OF DECISION.

Petitioner urges that the decision of the Court of Appeals in this case is in conflict with the principles of *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke, Inc.*, —— U. S. ——; 40 L. Ed. 2d 694, 700; 94 S. Ct. (May 28, 1974) and *The Standard Oil Co.* v. *Anderson*, 212 U. S. 215 (1909). There is no conflict. Petitioner does not contend that the ruling below is in direct conflict with *Cooper Stevedoring Company* but rather contends that it is in conflict with the underlying principle that one of two mutual wrongdoers should not be forced to bear the entire loss. The present case is not a case of joint tortfeasors, but rather is one of successive and independent contractual obligations, one subordinate to the other. There is no principle of equity which forbids one party who is under duty to perform an act from making a valid contract with another party to perform that duty for him. Indeed the requirements of equity were fully satisfied by the intimation of the Court of Appeals that intervening causal negligence, particularly that which would be "sufficient to preclude recovery", would dictate a different result. There was, furthermore, no misapplication of the "borrowed servant" doctrine. *Denton* v. *Yazoo & Mississippi Valley Railroad Co.*, 284 U. S. 305 (1932); *Park S.S. Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804 (2d Cir. 1951). These cases, as well as *The Standard Oil Co., supra,* make clear that the ultimate criterion of whether a servant has been borrowed is whether the work which he was doing at a particular time was the work of one party or the other. That is the standard that was applied by the Court of Appeals. The holding below that the work of Cory Brothers with respect to providing a safe berth was the work of Banco and that Banco is responsible therefor was correct.

POINT III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

There is in this case only a matter of factual determination and the application of established principles of law relating to warranty of a safe berth and the fellow servant rule.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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30 September 1974

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74/264

BANCO DO BRASIL,

Petitioner,

vs.

VENORE TRANSPORTATION COMPANY and OSWEGO SHIPPING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT VENORE TRANSPORTATION COMPANY

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BRIEF FOR RESPONDENT VENORE TRANSPORTATION COMPANY

Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit from an opinion of that Court[1] which insofar as the respondent Venore Transportation Company is concerned affirmed an opinion and judgment of the Hon. Edward Weinfeld of the United States District Court for the Southern District of New York[2].

This is an action by Venore Transportation Company to recover damages to its vessel, the S/S SANTORE, as a resul of an unsafe berth while at the port of Salvador, Brazil, under time charter to Oswego Shipping Corporation and

1. 498 F. 2d 469 (C.A.2C., 1974)
2. 363 F. Supp. 1366 (D.C.S.C.N.Y., 1973)

under sub-voyage charter to Banco do Brasil, petitioner herein who was third party defendant in the action in the Southern District. The Trial Judge found that there was a breach of the warranty of a safe berth in the charter by the time charterer and awarded plaintiff damages in the agreed sum of $265,727.29 with costs. On the claim over by Oswego Shipping Corporation the Trial Judge allowed a recovery against Banco do Brasil for one-half of the judgment awarded to plaintiff, Venore Transportation Company, to wit, the sum of $132,863.96 and half the costs of the action. Both defendant and third party plaintiff, Oswego Shipping Corporation, and third party defendant, Banco do Brasil, filed respective notices of appeal to the United States Court of Appeals for the Second Circuit. No appeal was taken by plaintiff, Venore Transportation Company.

The issue in the Circuit Court of Appeals was not the recovery of plaintiff but rather the holding that the two warrantors in the two charter parties should contribute equally to the recovery of Venore Transportation Company. On page 13 of its brief, in the Circuit Court of Appeals Oswego Shipping Corporation concedes that "There is, however, evidence to support the findings of the court below as to the safety of the berth and the lack of negligence on the part of the ship's master, Captain Edelheit. The argument on behalf of Appellant Oswego in this brief is mainly directed to the failure of the court below to accord to Oswego the right of full indemnity against its subcharterer Banco." Again in the conclusion on page 25 of its brief Oswego Shipping Corporation states that "Oswego is entitled to full indemnity from Banco do Brasil. The final judgment entered herein should be modified and amended accordingly." Significantly not a word that the judgment entered in favor of plaintiff should be disturbed. In its brief in the Circuit Court of Appeals, the third party de-

fendant Banco do Brasil makes a vain attempt to reduce the recovery of Venore Transportation Company by 50%. In a unanimous opinion the Circuit Court of Appeals affirmed the judgment below insofar as the recovery of Venore Transportation Company was concerned and modified the judgment granting the time charter complete indemnity by the voyage charter.

Issue Presented

The issue presented on the petition for a writ of certiorari does not involve the judgment entered in favor of plaintiff, Venore Transportation Company, one of the respondents herein. The question presented is whether the law requires a division of damages between the warrantors of a safe berth in the two charter parties. Neither in the brief submitted by Banco do Brasil, voyage charterer, in support of the petition for the writ of certiorari nor in the brief submitted by Oswego Shipping Corporation, time charterer, is any issue raised that the award to plaintiff should be reversed. In fact on page 4 of the brief of Oswego Shipping Corporation it states that "There is no issue as to unsafe berth or of Oswego's liability to Shipowner."

CONCLUSION

The judgment below awarding plaintiff, Venore Transportation Company, respondent herein, damages in the sum of $265,727.29 with costs, should be affirmed.

Respectfully submitted,

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